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No. 59223-8-I

King County Superior Court Cause No. 05 4 04942 9 SEA

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

ARTHUR R. GILROY,

Appellant,

vs.

ESTATE OF JEANNETTE L. BORGHI,

Respondent.

Brief of Appellant

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ASSIGNMENTS OF ERROR

1. On September 25, 2006, the Court Commissioner erred in granting Declaratory Judgment in favor of the Estate.
2. The Court erred in entering Findings of Fact and Conclusions of Law Nos. 12 through 26 in the Order entered on September 25, 2006, and again on November 3, 2006.
3. On November 3, 2006, the Judge erred in refusing to revise the Commissioner's order.

ISSUES

1. Did the Court Commissioner error in assigning the burden of proof? Should the Estate, not Mr. Gilroy, have been required to prove that there was intent by Mrs. Borghi to convert the real property from separate to community property?
2. Did the Court below improperly interpret the law required to convert separate property into community property?
3. Was there sufficient evidence relied upon by the court below to establish the intent of Mrs. Borghi to convert her separate property into community property?
4. Did the Court err in refusing to revise the Commissioner's ruling?

STATEMENT OF THE CASE

There are no facts in dispute. Jeanette Borghi died on June 25, 2005. (CP 11) No document purporting to be a will was located among the decedent personal effects. (CP 12) Petition for probate was filed by

the surviving spouse, Bobby G. Borghi on October 4, 2005. (CP 11-17) Since that time Mr. Borghi has passed away and a Successor Personal Representative has been appointed. (CP 141—143) The Estate of Jeanette Borghi is the Respondent. The Appellant is the son of the Decedent, Arthur R. Gilroy.

The real property that is the subject of this appeal is located in Pierce County, Washington. (CP 13) It was purchased by the Decedent, Mrs. Borghi, prior to her marriage to Mr. Borghi. (CP 80) It was purchased by a Real Estate Contract on March 16, 1966. (CP 80) Mr. and Mrs. Borghi were married on March 29, 1975. (CP 75) The Statutory Warranty Deed in fulfillment of the Real Estate Contract to the property was issued by the vendor Cedarview Development Company on June 12, 1975, to both as husband and wife. (CP 80)

A Petition for Declaratory Judgment Determining Title to Real Property was filed by the Estate on August 21, 2006. (CP 18) The Petition sought to have the property declared to be community property, therefore vesting in the surviving spouse. (CP 18) Arthur R. Gilroy argues that the real property is the separate property of the Decedent; therefore he would have an undivided one-half interest in the property. (CP 109-126) An

Order Granting Declaratory Judgment Determining Title to Real Property was entered by the Court Commissioner on September 25, 2006. (CP 127-132) That order decreed that the real property was community property and therefore vested in the surviving spouse.

Arthur R. Gilroy filed a motion for revision of the Commissioner's Order. (CP 133-134) Judge Michael Fox entered an Order denying the Motion for Revision on November 3, 2006. (CP 139-140) The ruling upheld the ruling of the Commissioner.

ARGUMENT

A. The property was brought into the marriage by the decedent as a separate property:

The rule regarding time and manner of acquisition was recognized by the court in the Matter of the Estate of William F. P. Binge v. Mumm, 5 Wn.2d 446, 484, 105 P.2d 689 (1940) where the court announced:

It is the rule in this state that the status of property, whether real or personal, *becomes fixed as of the date of its purchase or acquisition; and that the status, when once fixed, retains its character until changed by agreement of the parties or operation of law. Property acquired through contractual obligation*, as between husband and wife and all others claiming under them, has its origin *and is acquired as of the date when the obligation becomes binding, and not as of the time when the money is paid or the thing is delivered or conveyed*. The fruit of the

obligation is legally acquired as of the date when the obligation becomes binding. [Emphasis added]

The property was acquired by Mrs. Borghi on March 16, 1966, nine years prior to marriage, as her separate property.

Other commentary and cases follow the rule that property is characterized as of the date of acquisition. Kenneth W. Weber, 19 Washington Practice, Family and Community Property Law, §11.6 (1997). In re Marriage of Skarbek, 100 Wn. App. 444, 997 P.2d 447 (2000); In re Marriage of Gillespie, 89 Wn. App. 390, 948 P.2d 1338 (1997); In re Marriage of Sedlock, 69 Wn. App. 484, 849 P.2d 1243, review denied, 122 Wn.2d 1014 (1993).

Additionally, Professor Harry M. Cross in his seminal article states:

The author [Cross] thus believed it desirable that there be clear adoption of the mortgage rule in installment acquisitions: the ownership character of an asset acquired in performance of a contractual purchase obligation should be the same as the character of the initial obligation. (Harry M. Cross, THE COMMUNITY PROPERTY LAW IN WASHINGTON, Vol. 49: 729, 762 1974).

Professor Cross also quotes: "McKay insisted that an asset conveyed after marriage in fulfillment of an antenuptial contract was necessarily separate property." (Harry M. Cross, THE COMMUNITY PROPERTY LAW IN

WASHINGTON, Vol. 49: 729, 760 1974 quoting: G. McKay, COMMUNITY PROPERTY ch. 31 (2d ed. 1925). According to Professor Cross:

Property acquired through contractual obligation, as between husband and wife and all other claiming under them, has its origin and is acquired as of the date when the obligation becomes binding, and not as of the time when the money is paid or the thing is delivered or conveyed. The fruit of the obligation is legally acquired as of the date when the obligation becomes binding. Harry M. Cross, THE COMMUNITY PROPERTY LAW IN WASHINGTON, Vol. 49: 729, 1974, citing *Binge*, supra.

B. The property was not converted to community property:

Mrs. Borghi acquired the property on March 16, 1966. Mr. and Mrs. Borghi were married on March 29, 1975. The Statutory Warranty Deed to the property issued on June 12, 1975, to both as husband and wife.

When acquiring property by real estate contract, the ownership of real property becomes fixed when the obligation becomes binding, that is, at the time of execution of the contract of purchase. *Stokes v. Polley*, 145 Wn. 2d 341, 37 P. 3d 1211 (2001); *Beam v. Beam*, 18 Wn. App. 444, 453, 569 P.2d 719 (1977).

"Property is not characterized by title or the name under which it is held." Kenneth W. Weber, 19 Washington Practice, Family and

Community Property Law, §10.7 (1997); In re Marriage of Skarbek, 100 Wn. App. 444, 448, 997 P. 2d 447 (2000); In re Marriage of Hurd, 69 Wn. App. 38, 848 P. 2d 185, review denied, 122 Wn. 2d 1020 (1993).

The law in Washington is: *"that specific real or personal property once becoming separate property remains so, unless by voluntary act of the spouse owning it its nature is changed."* Volz v. Zang, 113 Wash. 378, 382, 194 Pac. 409 (1920). Also, In the Matter of the Estate of Dewey T. Verbeek, Sr. v. Irene L. Verbeek, 2 Wn. App. 144, 467 P. 2d 178 (1970) the court stated: *"that mere joinder in a contract, mortgage or deed by husband and wife or by two parties living together prior to marriage is insufficient to convert property into community property."*

C. The parties' refinance did not create community property.

This very issue was raised in Guye v. Guye, 63 Wash. 340, 352-53; 115 Pac. 731 (1911) where the court held:

[T]he right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character *until some direct and positive evidence to the contrary is made to appear. **Nor do we think the fact that the spouses have joined in mortgaging property sufficient evidence on which to found a claim that the property mortgaged is community property.*** While the

statute allows a husband or wife to sell and encumber his or her separate property, yet no prudent purchaser or mortgagee will ever take the separate deed or mortgage of a married man or married woman even when the other spouse sits by and disclaims interest. Such a deed or mortgage always requires explanation in subsequent dealings with the property whenever either of them forms a part of the chain of title, rendering the property less easy of disposition than it otherwise would be. ***The fact that both spouses joined in the encumbrances put on the property in this instance is, therefore, little or no evidence that the property was community rather than separate property.*** [Emphasis added]

D. The Statutory Warranty Deed prepared by grantor is insufficient to express Mrs. Borghi's intent to convert her separate property to community property.

In this case Mrs. Borghi had the means available to express her intent to convert her separate property into community; however she did not take such action. For the characterization of property to change there must be a specific and voluntary act that expressed Mrs. Borghi's intent to make the property community rather than to allow it to remain separate property.

The requirement of express intent is reiterated in Volz v. Zang, 113 Wash. 378, 382, 194 Pac. 409 (1920 quoting Guye v. Guye, 63 Wash. 340, 115 Pac. 731 (1911), where the court explained: "We think the statute meant to declare that a specific article of personal property, or a

specific tract of real property, once the separate property of one of the spouses, no matter how it may fluctuate in value, remains so, unless, by the voluntary act of the spouse owning it, its nature is changed."

"In order to convert separate property into community property, the mutual intention of the parties must be evidenced by a writing." Marriage of Shannon, 55 Wn. App. 137, 140, 777 P. 2d 8 (1989). 'Once established, separate property retains its separate character unless changed by deed, agreement of the parties, operation of law, or some other direct and positive evidence to the contrary.' In re Marriage of Skarbek, 100 Wn. App. 444, 447, 997 P. 2d 447 (2000); see also RCW 26.16.010. And in general, '[t]he burden is on the spouse asserting that separate property has transferred to the community to prove the transfer by clear and convincing evidence, In re Marriage of Skarbek, 100 Wn. App. 444, 447, 997 P. 2d 447 (2000), Marriage of Shannon, 55 Wn. App. 137, 140, 777 P. 2d 8 (1989).

Therefore, while Mr. Borghi's name may appear on the Statutory Warranty Deed the Washington Courts uniformly hold that this is not enough to allow a presumption that the property that was once

characterized as separate property should now be considered community property.

Had the parties intended on creating community property they would have created a conveyance. Mrs. Borghi could have executed a Quit Claim Deed to the community or the parties could have executed a Community Property Agreement. They did neither.

CONCLUSION

For the reasons expressed above, the commissioner erroneously applied the law to this case. It is harmful because it deprives Arthur R. Gilroy of valuable property rights. The Judge should have revised the decision of the Commissioner, but did not.

This Court should reverse the order regarding community property and enter an order establishing that the real property is separate property and remand this case for proceedings consistent with that opinion.

Respectfully submitted this 27th day of February, 2007.


Robert K. Ricketts WSBA #13871
Attorney for Appellant

AFFIDAVIT OF SERVICE/MAILING

STATE OF WASHINGTON)

: ss.

County of Pierce)


VIVIAN PARKER, being first duly sworn on oath, deposes and says:

I am a citizen of the United States of America and the State of Washington, over the age of twenty-one (21), not a party to the above-entitled proceeding and competent to be a witness herein.

On February 27, 2007, this affiant did place with Gary's Process Service and/or in the U.S. Mail, postage prepaid, a true and correct copy of Brief of Appellant and this Affidavit directed to and to be delivered to:

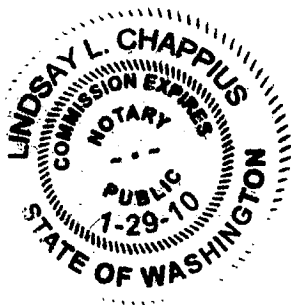
Sheila C. Ridgway
900 Fourth Avenue, Suite 1111
Seattle, WA 98164


Paulette Peterson
7869 Hansen Road NE
Bainbridge Island, WA 98110



Vivian Parker

WITNESS my hand and official seal this 27th day of February, 2007.





Printed Name: Lindsay L. Chappius
Notary Public in and for the State of
Washington, residing at Tacoma
My commission expires: 1-29-10

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RETURN OF SERVICE

IN THE APPEALS COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF DIVISION I

Case Number: 59223-8-1

APPELLANT:
ARTHUR R. GILROY,

Service Documents:
BREIF OF APPELLANT

vs.

RESPONDENT:
ESTATE OF JEANNETTE L. BORGHI,

Received by Gary's Process Service to be served on **SHEILA RIDGWAY, 900 4TH AVENUE, SUITE 1111, SEATTLE, WA.** I, Clinton Turan, do hereby affirm that on the 27 day of Feb, 2007 at 2:54p. m., executed service by delivering a true copy of the **BREIF OF APPELLANT** in accordance with state statutes in the manner marked below:

() PERSONAL SERVICE: I served Cheryle Perry as receptionist personally.

() SUBSTITUTE SERVICE: I served _____ by serving _____ at the residence and usual place of abode, a person of suitable age and discretion and a resident therein. Sub-service mailing was completed on _____ if required by statute.

() POSTED SERVICE: I posted to a conspicuous place on the property described herein. Mailing was completed on _____ if required by statute.

() CORPORATION SERVICE: I served _____ by serving _____, authorized to accept.


() NON SERVICE: For the reason detailed in the Comments below.

COMMENTS: _____

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RETURN OF SERVICE for 59223-8-I

I certify that I have no interest in the above action, am of legal age and have proper authority in the jurisdiction in which this service was made.



PROCESS SERVER # 9203261
Appointed in accordance
with State Statutes

**Gary's Process Service
108 Wells Avenue South
Renton, WA 98057
(425) 277-0302**

Our Job Serial Number: 2007003130